No. 14-770

IN THE

Supreme Court of the United States

BANK MARKAZI, THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH H. PETERSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE FORMER SENIOR OFFICIALS OF THE OFFICE OF LEGAL COUNSEL IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. Section 8772 Is A Valid Exercise Of Legislative Authority 7

B. Section 8772 Is Valid Even If The Consolidated Actions Here Are Treated As A Single Case 9

C. Section 8772 Is Valid Even If It Effectively Resolves This Case 18

1. *Klein* does not apply when Congress amends the underlying law 18

2. The unique considerations in *Klein* are absent here 21

D. Section 8772's Constitutionality Is Reinforced By The Political Branches' Power To Regulate Foreign Affairs 25

CONCLUSION 29

APPENDIX

TABLE OF AUTHORITIES

CASES

Page(s)

Biodiversity Associates v. *Cables*, 357 F.3d 1152 (10th Cir. 2004) 14, 17

Buckley v. *Valeo*, 424 U.S. 1 (1976) 8

Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948) 6, 26

City of New York v. *Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) 21

Dennis v. *Higgins*, 498 U.S. 439 (1991) 20

Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) 3, 6, 9

Ileto v. *Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) 20

In re Clinton Bridge, 77 U.S. (10 Wall.) 454 (1870) 11, 13

In re NSA Telecommunications Records Litigation, 671 F.3d 881 (9th Cir. 2011) 20-21

INS v. *Chadha*, 462 U.S. 919 (1983) 8, 13

Japan Whaling Ass'n v. *American Cetacean Society*, 478 U.S. 221 (1986) 6

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 5-6, 24

Miller v. *French*, 530 U.S. 327 (2000) 14

Mistretta v. *United States*, 488 U.S. 361 (1989) 10

National Coalition to Save Our Mall v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001) 14-15, 17

TABLE OF AUTHORITIES—Continued

Page(s)

Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977) 13, 15, 17

Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) 11, 14

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) ..... *passim*

Pope v. *United States*, 323 U.S. 1 (1944) 13, 19

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 13, 15

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 28

Republic of Mexico v. *Hoffman*, 324 U.S. 30 (1945) 27

Robertson v. *Seattle Audubon Society*, 503 U.S. 429 (1992) 3, 5-6, 8-9, 18

Roeder v. *Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003) 12

Schooner Exchange v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812) 26

SeaRiver Maritime Financial Holdings Inc. v. *Mineta*, 309 F.3d 662 (9th Cir. 2002) 14, 15

Selective Service System v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) 17

United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) 4, 12, 18, 20-25, 28

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870) 21-22

United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 14

United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) 13, 25

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 26

Vermont v. *New York*, 417 U.S. 270 (1974) 6

Village of Willowbrook v. *Olech*, 528 U.S. 562 (2000) 17

Wayman v. *Southard*, 23 U.S. (10 Wheat.) 1 (1825) 5

Williams-Yulee v. *Florida Bar*, 135 S. Ct. 1656 (2015) 16

Williamson v. *Lee Optical of Oklahoma Inc.*, 348 U.S. 483 (1955) 16, 17

Yakus v. *United States*, 321 U.S. 414 (1944) 5, 8

Yee v. *City of Escondido*, 503 U.S. 519 (1992) 17

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 10

Zivotofsky v. *Clinton*, 132 S. Ct. 1421 (2012) 26

Zivotofsky v. *Kerry*, 135 S. Ct. 2076 (2015) 10

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

22 U.S.C.
§ 8711 ..... 7, 27
§ 8772 ..... *passim*
§ 8772(a)(1) 7-9
§ 8772(a)(2) 9

50 U.S.C.
§ 1885a 20
§ 1885a(i) 20

Abandoned and Captured Property Act, ch. 120, 12 Stat. 820 (1863) 21

Act of February 27, 1942, ch. 122, 56 Stat. 1122 11

An Act to Amend the Indian Claims Commission Act of August 13, 1946, and for Other Purposes, Pub. L. No. 95-243, 92 Stat. 153 (1978) 11

An Act to Expedite the Construction of the World War II Memorial in the District of Columbia, Pub. L. No. 107-11, 115 Stat. 19 (2001) 11

An Act Making Appropriations for the Department of the Interior and Related Agencies for the Fiscal Year Ending September 30, 1990, and for Other Purposes, Pub. L. No. 101-121, 103 Stat. 701 (1989) 11

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, 115 Stat. 748 (2001) 12

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Page(s)

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Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill, 25 Op. O.L.C. 279 (2001) 2, 12, 28

Constitutionality of a Judicial Review Provision Providing for Automatic Affirmance of Agency Decisions, 9 Op. O.L.C. 118 (1985) 2, 7

Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4 Op. O.L.C. 21 (1980) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Constitutionality of Legislation Limiting the Remedial Powers of the Inferior Federal Courts in School Desegregation Litigation, 6 Op. O.L.C. 1 (1982) 2

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Constitutionality of the Federal Advisory Committee Act, 1 Op. O.L.C. Supp. 502 (1974) 22

Possible Participation by the United States in Islamic Republic of Iran v. Pahlavi, 4 Op. O.L.C. 160 (1980) 27

Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253 (1996) 23

Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182 (1996) 23

Section 609 of the FY 1996 Omnibus Appropriations Act, 20 Op. O.L.C. 189 (1996) 23

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TABLE OF AUTHORITIES—Continued

Page(s)

Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C. __ (Sept. 19, 2011) 26

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Locke, John, *Two Treatises of Government* (1690) (Peter Laslett ed., Cambridge Univ. Press 1988) 5

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INTEREST OF AMICI CURIAE[1]

Amici curiae are former senior officials of the Office of Legal Counsel, U.S. Department of Justice, who have served in administrations of both political parties and who have substantial background in and experience with questions involving the constitutional separation of powers.[2] Exercising authority delegated by the U.S. Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all Executive Branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department of Justice.

Although the Office of Legal Counsel frequently advises on constitutional questions concerning the Executive Branch's actions or the relationship between the Executive Branch and a coordinate branch of government, *see, e.g.*, *The Constitutional Separation of Powers Between the President and Congress* ("*OLC Separation of Powers Op.*"), 20 Op. O.L.C. 124 (1996), the Office also provides legal advice on constitutional questions concerning a coordinate branch's actions or the relationship between the coordinate branches when there is occasion to do so, including in the course of re-

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[1] Letters consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of amici is set forth in the appendix to this brief.

viewing pending legislation for the President's consideration, *see, e.g.*, *Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill* ("*OLC Iran Op.*"), 25 Op. O.L.C. 279, 284-285 (2001) (opining on the constitutionality of proposed legislation that would divest Iran of sovereign immunity for one suit); *Constitutionality of a Judicial Review Provision Providing for Automatic Affirmance of Agency Decisions* ("*OLC Affirmance Op.*"), 9 Op. O.L.C. 118, 119-122 (1985) (opining on the constitutionality of proposed legislation that deemed agency decisions to be affirmed if the reviewing court did not rule on a petition for review within the prescribed period); *Constitutionality of Legislation Limiting the Remedial Powers of the Inferior Federal Courts in School Desegregation Litigation*, 6 Op. O.L.C. 1, 9-10 (1982) (opining on the constitutionality of proposed legislation that would limit the power of courts to order busing remedies).

Amici have differing views on many constitutional questions, but share a steadfast commitment to the Constitution's separation of powers. Amici file this brief to set forth their view that section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (codified at 22 U.S.C. § 8772), is consistent with the constitutional separation of powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article I of the Constitution vests Congress with the "legislative Power[]," the core of which is the authority to make and amend law. Constitutional structure, historical practice, opinions of the Office of Legal Counsel, and the Court's precedents all establish that Congress ordinarily may exercise that legislative power broadly or narrowly—including with respect to spe-

cific subjects and particular parties—and that courts are bound to apply that law, even to cases pending at the time Congress enacted or amended the law. Because section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (codified at 22 U.S.C. § 8772) is a valid exercise of Congress's prerogative to amend the law with respect to pending cases, it is consistent with the separation of powers.

To be sure, the Court appropriately has recognized important limits on congressional actions that interfere with Article III's vesting of the "judicial Power" in the Judicial Branch. Under the Court's precedents, and consistent with the foundational principle that it is the province of the Judicial Branch to say what the law is, Congress may not usurp a court's power to interpret and apply the law to the set of facts before it. *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992). Nor may Congress sit in review of judicial decisions or grant the Executive Branch the authority to do the same. *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792). Finally, Congress may not reopen or revise already final judgments. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995). Because § 8772 does not transgress any of those limits, it does not violate Article III or general separation of powers principles.

Petitioner does not seriously contest those points. Instead, petitioner argues that Congress acts unconstitutionally when it amends existing law as applied to a single pending "case." Although other constitutional provisions might constrain Congress's authority to enact special rules for single cases in some circumstances, the view that the separation of powers does not prevent Congress from legislating narrowly, even with respect to a single pending case, is supported by congressional practice since the founding, the Court's opinions,

and the considered judgment of the Executive Branch. Indeed, petitioner's proposed "single case" rule would be unworkable in practice, as this case illustrates: respondents' "case" actually comprises more than 1,000 claims brought by the representatives of hundreds of Americans killed in multiple Iran-sponsored terrorist attacks. These claims were asserted in at least eighteen different lawsuits and have now been consolidated into a single class action solely because they are all seeking collection of judgments with regard to the same assets. Congress's authority to legislate cannot turn on how many pending cases a law affects, whether inadvertently or by design.

Nor does the fact that § 8772 might effectively dictate the outcome of this litigation render the statute unconstitutional under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). As the Court has held, whatever the precise scope of *Klein*, its principles do not apply when Congress amends the underlying law that governs a pending case. That is true even when the facts of a case might be undisputed or the amended law is all but dispositive of pending legal claims, as decisions of this Court and the courts of appeals have long established. Beyond that, *Klein* involved a statute that presented an exceptional set of concerns: a Reconstruction-era Congress was effectively manipulating the jurisdiction of the federal courts in an attempt to nullify the President's exercise of his constitutionally based pardon power and the courts' own power to interpret the law. Those same considerations are not present here.

Finally, whatever limits on congressional power might be inferred from *Klein* or other cases, those limits should not apply in a case such as this, in which the political branches amend existing rules governing exe-

cution against a foreign state's property in satisfaction of judgments against a foreign state. In light of the exclusive authority of the political branches to regulate foreign affairs, as well as the well-established practice prior to the Foreign Sovereign Immunities Act of deferring to the political branches' case-by-case sovereign immunity determinations, any limits imposed by the separation of powers on Congress's authority to legislate with respect to a single case (or series of related cases) would not apply to § 8772.

ARGUMENT

The Framers of the Constitution established a system of government in which the Article III judicial power is the power "to determine all differences according to the established law," while the Article I legislative power is the authority to make that "established law." Locke, *Two Treatises of Government* 295-296 (1690) (Laslett ed., Cambridge Univ. Press 1988); *see also, e.g.*, *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law ...."); *Yakus* v. *United States*, 321 U.S. 414, 424 (1944) ("The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct ...."); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Under this constitutional framework, Congress exercises its constitutional prerogatives when it "set[s] out substantive legal standards for the Judiciary to apply," either by enacting new law or by amending existing law. *Plaut*, 514 U.S. at 218; *see also Seattle Audubon*, 503

U.S. at 438 (Congress acts within its constitutionally assigned authority when it "compel[s] changes in law").

Of course, even when exercising legislative power, Congress may violate the separation of powers by encroaching upon, or self-aggrandizing at the expense of, another branch's constitutional functions or powers. *See, e.g.*, *OLC Separation of Powers Op.*, 20 Op. O.L.C. at 127. The Court's decisions have recognized several such limits with respect to the Judiciary. Congress may not usurp the courts' power to interpret the law, *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("one of the Judiciary's characteristic roles is to interpret statutes"); *Marbury*, 5 U.S. at 177, nor may it "direct any particular findings of fact or applications of law, old or new, to fact," *Seattle Audubon*, 503 U.S. at 438; *see also Vermont* v. *New York*, 417 U.S. 270, 277 (1974) (judicial power "embraces application of principles of law or equity to facts"). Congress also may not interfere with the courts' "power, not merely to rule on cases, but to *decide* them"—that is, to "render dispositive judgments." *Plaut*, 514 U.S. at 218-219 (quotation marks omitted). Thus, Congress may not "sit as a court of errors" reviewing the decisions of federal courts, nor allow Executive Branch officials to do so. *Hayburn's Case*, 2 U.S. at 410; *see also Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Finally, Congress may not reopen final judgments. *Plaut*, 514 U.S. at 218.

However, outside those specific circumstances, Congress acts within constitutional bounds when it enacts or amends rules to be applied by the Judiciary, as the Office of Legal Counsel has previously explained: "Congress has the constitutional authority to enact laws establishing the framework within which judicial decisions must be made. It has broad authority to pre-

scribe rules of practice and procedure, to define and limit jurisdiction, and to limit remedies available to litigants. In addition, Congress prescribes the substantive law that governs judicial decisions." *OLC Affirmance Op.*, 9 Op. O.L.C. at 121 (footnotes omitted). Consistent with these principles, § 8772 falls squarely within Congress's legislative power to make and "amend[] applicable law." *Plaut*, 514 U.S. at 218 (quotation marks omitted).

A. Section 8772 Is A Valid Exercise Of Legislative Authority

On August 10, 2012, President Obama signed the Iran Threat Reduction and Syria Human Rights Act of 2012 into law. Pub. L. No. 112-158, 126 Stat. 1214. Part of continuing efforts by the United States to pressure Iran to comply with international obligations, the statute furthers the stated "goal of compelling Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities." 22 U.S.C. § 8711.

Section 502 of the Act (codified at 22 U.S.C. § 8772), at issue here, makes certain assets of Iran available for execution in a federal court. As petitioner acknowledges, § 8772 does this by "supersed[ing] all contrary laws, state and federal," and "[i]n their place, ... establish[ing] a new rule under which the assets at issue 'shall be subject to execution' if the court makes two findings." Pet. Br. 2 (quoting 22 U.S.C. § 8772(a)(1)); *see also id.* at 12 (§ 8772 "alters the governing rules, preempting state law and superseding other federal requirements"). More specifically (again in petitioner's words), § 8772 "overrides" the rules governing the attachment of the financial assets against which respondents seek to execute their judgments—here, Article 8 of the Uniform Commercial Code. *Id.* at 13. It also su-

persedes provisions of the Foreign Sovereign Immunities Act (FSIA), rendering them inapplicable to the present case. *Id.* at 12-13, 28; *see* 22 U.S.C. § 8772(a)(1) (imposing its rules "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law").

In enacting § 8772, Congress exercised legislative power. Congress enacted a "defined and binding rule" that altered the parties' rights and obligations. *Yakus*, 321 U.S. at 424; *see also INS* v. *Chadha*, 462 U.S. 919, 952 (1983). Establishing new legal rules for courts to apply—or, as here, replacing previously applicable legal rules with new rules—is precisely the role that the Constitution assigns to Congress and that the Court and the Executive Branch have long described as the province of the Legislative Branch. *E.g.*, *Plaut*, 514 U.S. at 218; *Seattle Audubon*, 503 U.S. at 438; *Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976) ("Legislative power ... is the authority to make laws ...." (quotation marks omitted)); *Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President*, 4 Op. O.L.C. 21, 24-25 (1980) (Congress's function is "to enact laws" and, if necessary, to engage in "the plenary legislative process of amendment and repeal"); *see also The Federalist* No. 33, at 204 (Hamilton) (Cooke ed., 1961) ("What is a legislative power, but a power of making laws?").

Nor does § 8772 transgress any of the limits the Court has recognized on Congress's authority with respect to Article III. *See supra* pp. 6-8. Section 8772 does not direct any particular interpretation of the law, findings of fact, or application of law to facts. *Seattle*

Audubon, 503 U.S. at 438.[3] It does not make any judicial decisions subject to review by Congress or the Executive Branch. *Hayburn's Case*, 2 U.S. at 410. And it does not reopen any final judgments. *Plaut*, 514 U.S. at 218-219. It simply amended the underlying law—which is Congress's constitutional prerogative.

B. Section 8772 Is Valid Even If The Consolidated Actions Here Are Treated As A Single Case

Petitioner does not actually dispute the constitutional analysis above. Rather, petitioner's principal objection is that § 8772 offends the separation of powers because, petitioner says, it applies to a single, known, pending "case." Pet. Br. 22. According to petitioner, the judicial power is that "of deciding particular cases," whereas the legislative power is that "of enacting general pronouncements of law." *Id.* at 23.

Though descriptively accurate in many instances, that dichotomy does not correctly define the line between Article I legislative power and Article III judicial power. As petitioner's language hints, there may also be occasion for *specific* pronouncements of law by Congress. Although other constitutional provisions or principles may constrain Congress's authority to enact a law governing a single pending case, Article I and the constitutional separation of powers do not. This conclu-

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[3] Congress explicitly left to the district court the determination of several predicate facts about the assets at issue, including (1) that they are "held in the United States," (2) that they are "blocked asset[s]" under U.S. law, (3) that "Iran holds equitable title to, or the beneficial interest in," them, and (4) "that no other person possesses a constitutionally protected interest in" them. 22 U.S.C. § 8772(a)(1)-(2). The district court made the requisite findings after the law's enactment. Pet. App. 63a-64a, 96a-101a.

sion is supported by sustained congressional practice dating back to the founding, by decisions of the Court throughout our Nation's history, by the Executive's affirmation, and by compelling practical considerations.

1. Petitioner is mistaken that § 8772 is "virtually unprecedented" in its specificity. Pet. Br. 18. Congress has enacted bills directed at specific individuals or cases throughout American history. This long practice is compelling evidence that legislative specificity alone does not give rise to a separation of powers problem. *See Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2091 (2015) ("In separation-of-powers cases this Court has often put significant weight upon historical practice." (quotation marks omitted)); *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (noting, in separation of powers context, that "'traditional ways of conducting government ... give meaning' to the Constitution" (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring))).

From the earliest days of the Republic, Congress has regularly passed private bills, often to indemnify specific public officials who had been found liable in specific cases. *E.g.*, Pfander & Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1872-1878, 1888-1914 (2010). As the Court has recognized, "[p]rivate bills in Congress are still common, and were even more so in the days before establishment of the Claims Court." *Plaut*, 514 U.S. at 239 n.9.

Even apart from private bills, Congress has regularly enacted laws that govern a single or very small number of specific subjects. For example, two well-known cases from the nineteenth century involved fed-

eral laws singling out particular bridges as lawful. *See In re Clinton Bridge*, 77 U.S. (10 Wall.) 454, 462-463 (1870) (upholding act that declared a specific bridge, at issue in pending litigation, to be "a lawful structure"); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430-432 (1856) (upholding act that determined a single bridge was "no longer an unlawful obstruction"). This practice was also common in the twentieth century. *E.g.*, Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 706, 116 Stat. 820, 864-869 (2002) (appropriations rider targeted at particular environmental settlement agreement); An Act to Expedite the Construction of the World War II Memorial in the District of Columbia, Pub. L. No. 107-11, 115 Stat. 19 (2001) (legislation targeted at challenges to planned memorial); An Act Making Appropriations for the Department of the Interior and Related Agencies for the Fiscal Year Ending September 30, 1990, and for Other Purposes, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-750 (1989) (legislation targeted at particular forests at issue in two pending cases); An Act to Amend the Indian Claims Commission Act of August 13, 1946, and for Other Purposes, Pub. L. No. 95-243, 92 Stat. 153 (1978) (legislation targeted at particular takings claim brought by Sioux Nation); Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974) (legislation targeted at former President Nixon's records); Act of Feb. 27, 1942, ch. 122, 56 Stat. 1122 (legislation targeted at single individual's claims against the government).

Indeed, as petitioner acknowledges, Congress passed a law quite similar in scope and effect to § 8772 in 2001, in order to abrogate Iran's sovereign immunity

in lawsuits arising out of the 1979 U.S. embassy hostage crisis. Pet. Br. 53. The plaintiffs in that case, former American hostages, had won a default judgment against Iran in August 2001. *Roeder* v. *Islamic Rep. of Iran*, 333 F.3d 228, 230 (D.C. Cir. 2003). The State Department intervened and moved to vacate the judgment, arguing that both the Algiers Accords and the FSIA barred the suit. *Id.* at 231. In November 2001, while that motion was pending, Congress passed an appropriations rider providing that a foreign state would not enjoy immunity for an act that was "related to Case Number 1:00CV03110 (ESG) in the United States District Court for the District of Columbia." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001). As here, that law applied only to a specific "case," identified by docket number. Nonetheless, the Office of Legal Counsel advised the White House that "[n]othing in the Constitution bar[red] Congress from enacting such legislation." *OLC Iran Op.*, 25 Op. O.L.C. at 285; *see id.* ("*Klein* does not ... prohibit Congress from *changing the underlying law* that governs in a pending case ....").[4]

The Court has repeatedly confirmed that a federal law is not invalid merely because it applies, in purpose or effect, to a single subject or a very small group of specific subjects. In *Plaut*, for example, the Court expressly rejected the argument advanced by petitioner here that Congress's legislative powers are limited to

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[4] The Court of Appeals for the D.C. Circuit, in *Roeder*, found it unnecessary to address the constitutionality of the legislation because it determined that the plaintiffs' claims were barred by the Algiers Accords. 333 F.3d at 237-238 & n.5.

the prescription of rules having general scope: "While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. ... Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid ...." 514 U.S. at 239 n.9.

In addition, in *Chadha*, the Court held that a resolution by the U.S. House of Representatives purporting to veto the Attorney General's decision to suspend the deportation of six specifically identified individuals was "subject to the standards prescribed in" Article I because it was "clear that it was an exercise of legislative power." 462 U.S. at 926-928, 956-957. Although the Court "agree[d] that there is a sense in which [the resolution] has a judicial cast," the Court was "satisfied that the one-House veto is legislative" because it "had the purpose and effect of altering the legal rights, duties and relations of persons ... outside the legislative branch." *Id.* at 952, 957 n.22.

On other occasions too, this Court and lower courts have upheld as a valid exercise of Congress's legislative power laws that governed one or a very small number of specific subjects. *E.g.*, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 406-407 (1980) (upholding act that required court to rehear particular claim brought by tribe under the Takings Clause); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 471-472 (1977) (upholding act that applied to former President Nixon's records as legislation governing a "legitimate class of one"); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 158-159 (1974) (upholding act that applied to specific railroads in a single region); *Pope* v. *United States*, 323 U.S. 1, 10-12 (1944) (upholding special act giving a contractor the right to recover additional compensation from the government); *Clinton Bridge*, 77 U.S. at 462-

463 (upholding act governing a single bridge); *Wheeling Bridge*, 59 U.S. at 430-432 (same); *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1167-1168 (10th Cir. 2004) (upholding law that abrogated specific settlement agreement between U.S. Forest Service and environmental groups); *SeaRiver Mar. Fin. Holdings Inc.* v. *Mineta*, 309 F.3d 662, 669, 674-675 (9th Cir. 2002) (upholding law that effectively applied to a single oil tanker); *see also National Coal. to Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (upholding law that applied to a single memorial and "find[ing] the level of specificity to be unobjectionable").

2. Nor is the scope of Congress's power to legislate diminished simply because the law's subject was also the subject of a pending lawsuit at the time of enactment. The Court's jurisprudence has been clear on this point since the early days of the Republic: when rendering judgments, courts must apply the law as they find it at the time of their decisions. *See, e.g.*, *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *see also Miller* v. *French*, 530 U.S. 327, 344 (2000). That principle is a corollary of the power of Congress, described above, to make and amend law for the Judicial Branch to apply. Thus, "if ... a law intervenes and positively changes the rule which governs, the law must be obeyed." *Schooner Peggy*, 5 U.S. at 110. More recently, in *Plaut*, this Court reaffirmed that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." 514 U.S. at 226-227.

It is therefore clear—as a matter of precedent as well as first principles—that Congress can legislate on a specific subject and with respect to pending cases.

When Congress does both at the same time, it does not cross a constitutional line. As the D.C. Circuit has held in similar circumstances, there is "no reason why the specificity [of the law] should suddenly become fatal merely because there happened to be a pending lawsuit." *National Coal.*, 269 F.3d at 1097; *cf. Plaut*, 514 U.S. at 238-239. Indeed, an amicus supporting petitioner has elsewhere correctly noted "the emptiness of the argument that legislation is invalid if too litigation-specific"; if it would be valid to enact a specific law prior to a lawsuit, the fact that a case was "pending, rather than anticipated," is of no constitutional significance. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 69 (2010).

3. There are sound reasons why Congress has the power to legislate narrowly, even to the point of a single subject, and even if a suit involving the subject is already pending.

First, as the Court has recognized, sometimes a problem exists only with respect to a very limited number of subjects, and Congress needs the corresponding power to provide tailored solutions. In *Nixon*, for example, the Court held that the Presidential Recordings and Materials Preservation Act "fairly and rationally" applied only to former President Nixon's papers—the law "refer[red]" to him "by name"—because he was the only former President who could have destroyed his papers. 433 U.S. at 471-472; *see also, e.g., Regional Rail*, 419 U.S. at 159 (Congress can "fashion legislation to resolve geographically isolated problems"); *SeaRiver*, 309 F.3d at 674-675 (Congress could legitimately conclude that a particular oil tanker posed a greater environmental risk).

More generally, the Court has observed: "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. ... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955); *see also Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1668 (2015) ("A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns.").

Second, a rule that made the constitutionality of a statute turn on the number of pending cases it affected would be unworkable. As this case demonstrates, multiple participants in a single event may file their claims separately, or together, and later they may join their suits, or sever them. Indeed, respondents' "case" actually comprises more than 1,000 claims brought by "the representatives of hundreds of Americans killed in multiple Iran-sponsored terrorist attacks." Pet. App. 2a. These claims were asserted in at least eighteen different lawsuits and have now been consolidated into a single class action solely because "they are all seeking collection of judgments with regard to the same assets." *Id.* at 52a n.1.

Thus, petitioner's position raises unresolvable questions such as: Is this one case, eighteen cases, hundreds of cases, or more than a thousand cases? And how few cases can a congressional act govern before it transforms from "lawmaking" into "adjudicating"? Amici submit that there are no coherent and constitutionally meaningful answers to these questions. There is certainly no reason to conclude that the scope of

Congress's legislative power turns on whether people who would be affected by a law decided before the law was enacted to avail themselves of a procedural device designed to promote expedient litigation. As one court aptly put it, "it only 'prolongs doubt and multiplies confrontation' to make the constitutional analysis hinge on the murky distinction between generalized lawmaking and particularized application of the law." *Biodiversity Assocs.*, 357 F.3d at 1168 (quoting *Plaut*, 514 U.S. at 240).

4. That laws applying to a very narrow class of pending lawsuits do not offend the constitutional separation of powers is not to say that there are no constitutional constraints on Congress's power to legislate narrowly. Rather, the Constitution provides various safeguards that might apply to such legislation.

The Bill of Attainder Clause provides one obvious safeguard. *See Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 847 (1984) (Bill of Attainder Clause protects against "singling out of an individual for legislatively prescribed punishment" (quotation marks omitted)); *Plaut*, 514 U.S. at 239 n.9; *Nixon*, 433 U.S. at 468-484; *National Coal.*, 269 F.3d at 1097. The Equal Protection Clause offers another. *See Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000) (per curiam) (a single individual can bring an Equal Protection challenge on behalf of a "class of one"); *Lee Optical*, 348 U.S. at 488-489; *National Coal.*, 269 F.3d at 1097. Still further protection might be afforded by the Takings Clause in appropriate cases. *See Yee* v. *City of Escondido*, 503 U.S. 519, 522-523 (1992) (Takings Clause requires just compensation where "regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole").

In fact, as the Court has observed, the very presence of these safeguards confirms that Congress may legislate narrowly: "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely 'singling out' but also punishment ...." *Plaut*, 514 U.S. at 239 n.9 (emphasis omitted).

C. Section 8772 Is Valid Even If It Effectively Resolves This Case

Seizing on the remark in *Klein* that Congress cannot "prescribe rules of decision" in cases pending before the courts, 80 U.S. at 146, petitioner also objects to § 8772 because it in effect dictates the outcome of the pending proceeding. Petitioner misapprehends the Court's opinion in *Klein*. Even if § 8772 leaves no doubt as to the disposition of the case, it is still consistent with the separation of powers.

1. *Klein* does not apply when Congress amends the underlying law

"Whatever the precise scope of *Klein*, ... its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (quoting *Seattle Audubon*, 503 U.S. at 441). Because, as discussed above, § 8772 operates by amending the law governing attachment of assets and foreign sovereign immunity, the principle articulated in *Klein* does not bear on this case.

Resisting the Court's reading of its own precedent, petitioner argues that whatever the precise scope of *Klein*, its prohibition does take hold when "a statute ... compels the outcome in a case," Pet. Br. 48-50, which,

petitioner says, § 8772 does by making the availability of the assets in question turn on facts that were "foregone conclusions" at the time § 8772 was enacted, *id.* at 47.

Even if the outcome of this litigation was foreordained upon enactment, however, that would not undermine the validity of § 8772 under *Klein*.[5] As explained above, whenever Congress amends the law, the courts will presumptively apply that new law to cases pending at the time of enactment. *E.g.*, *Plaut*, 514 U.S. at 226-227. In some cases, the relevant facts will be uncontested, undeniable, or already established by the factfinder. Yet in those cases, the role of the court to apply the law to the facts and render a binding final judgment remains undiminished, no matter how obvious the result may seem. As the Court has made clear, "[i]t is [still] a judicial function and an exercise of the judicial power to render judgment on consent," as well as to "give judgment on a legal obligation which the court finds to be established by stipulated facts." *Pope*, 323 U.S. at 12; *see also* Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 718 (1995) (Congress often "effectively dictate[s] the result in individual cases" when it amends law).

This point becomes even clearer when one considers Congress's well-settled authority to repeal a cause

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[5] Amici take no position on whether the predicate facts were a foregone conclusion at the time of § 8772's enactment. The district court, however, disagreed with petitioner on this point, saying, "[t]here is frankly plenty for this Court to adjudicate," including "whether the Blocked Assets were owned by Iran, or [whether] [other parties] have some form of beneficial or equitable interest." Pet. App. 115a.

of action or to provide particular defendants with immunity. *See, e.g.*, *Dennis* v. *Higgins*, 498 U.S. 439, 450 (1991) ("federal statutory rights" can be "altered or eliminated by Congress"). There is no doubt that a legislative amendment repealing a cause of action or setting up an immunity is a valid exercise of Congress's legislative power (at least as a separation of powers matter), even if its effect is to terminate a legal claim pending at the time of enactment.

A recent decision by the Court of Appeals for the Ninth Circuit confirms that conclusion. Following the public disclosure of the government's warrantless wiretapping program in 2005, numerous plaintiffs sued major telecommunications carriers over their participation in the program. *In re NSA Telecomms. Records Litig.* ("*NSA Records*"), 671 F.3d 881, 890-891 (9th Cir. 2011). While the lawsuits were pending—and "partially in response" to them—Congress enacted a law providing that no action could be maintained against any person for assisting the program. *Id.* at 891 (citing Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 802, 122 Stat. 2436, 2468-2470 (2008) (codified at 50 U.S.C. § 1885a)). The law expressly applied to all actions pending on the date of enactment. 50 U.S.C. § 1885a(i). It was therefore effectively dispositive of those actions, as Congress intended. *NSA Records*, 671 F.3d at 893. Yet the court of appeals upheld the law against various separation of powers challenges—among them, the claim that the statute effected a "legislative incursion upon the judicial branch." *See id.* at 894-899. Other courts of appeals have reached similar results in related circumstances. *See Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1139-1140 (9th Cir. 2009) (rejecting *Klein* challenge to federal statute requiring courts to dismiss certain pending civil actions

against firearms suppliers because statute amended the relevant law); *City of N.Y.* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 395-396 (2d Cir. 2008) (same).

Those decisions reflect that no separation of powers principle requires Congress to be surprised by the application of the laws it enacts. Because § 8772 merely amends existing laws, it is valid under *Klein* regardless of whether the predicate facts upon which its application depends were predetermined and the eventual outcome of the case was known to Congress when it passed the law.

2. The unique considerations in *Klein* are absent here

In any event, petitioner misstates *Klein*'s holding. The decision arose from a rare—perhaps unique—situation in which Congress attempted to manipulate the jurisdiction and functioning of the Judicial Branch to accomplish a constitutionally impermissible end.

During the Civil War, Congress enacted a law allowing the government to seize property held by persons aiding the rebellion. Abandoned and Captured Property Act, ch. 120, 12 Stat. 820 (1863). However, an owner could recover seized property if he could prove that he "had never given aid or comfort" to the Confederacy. *Klein*, 80 U.S. at 139. After President Lincoln issued a proclamation pardoning all persons who "t[ook] and subscribe[d] a prescribed oath of allegiance" to the United States, *id.* at 132, this Court was asked to determine whether the executive pardon entitled a property owner to recover seized property. The Court then held that the pardon controlled. *See United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870). Con-

gress, in the midst of Reconstruction, responded to *Padelford* by enacting the law at issue in *Klein*.

That law contained several (often overlapping) provisions. First, no pardon would be admissible in the Court of Claims to establish a claimant's right to recover property. *Klein*, 80 U.S. at 143. Second, if a pardon had already been admitted as evidence, no court could consider it. *Id.* Third, loyalty had to be proved "according to the provisions of certain statutes, irrespective of the effect of any executive proclamation [or] pardon." *Id.* Fourth, if judgment had already been entered on other proof of loyalty (for example, a pardon), the Supreme Court's jurisdiction would cease and it would have to dismiss the case. *Id.* Fifth, any pardon for supporting the rebellion that was not accompanied by an express disclaimer of disloyalty would be "deemed" in the courts "conclusive evidence" of disloyalty. *Id.* at 143-144. Finally, on proof of such a pardon, the court's jurisdiction would cease and the case would be dismissed. *Id.* at 144.

The Court held in *Klein* that the new law was unconstitutional because it directly "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive," to whom the Constitution "intrust[s]" the pardon power "alone." 80 U.S. at 147. "[I]t is clear," the Court explained, "that the legislature cannot change the effect of such a pardon any more than the executive can change a law." *Id.* at 148. As an attempt to do exactly that, the law impermissibly "impair[ed] the executive authority." *Id.*[6]

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[6] The Executive Branch has long focused on this aspect of *Klein*'s reasoning. *E.g.*, *Constitutionality of the Federal Advisory Committee Act*, 1 Op. O.L.C. Supp. 502, 505 (1974) (recognizing that *Klein* struck down a law "which tended to undercut the effect

There was, however, a second separation of powers problem with the law. Lacking the constitutional authority to "change the effect of ... a pardon," Congress infringed on the judicial power by "direct[ing] the court to be instrumental to that [impermissible] end." *Klein*, 80 U.S. at 148. The law accomplished that result not by amending the law so that when the courts independently applied it in pending cases, they reached a different result from the one they would have reached under the old law. Rather, the law sought to aggrandize for Congress the courts' role of interpreting and applying law and to manipulate the courts' jurisdiction to ensure that the courts entered judgments on the merits only when favorable to Congress's position, which was to undermine the President's valid use of the pardon power.

For example, the Court in *Klein* criticized the law's "great and controlling purpose" of "deny[ing] to pardons granted by the President *the effect which this court had adjudged them to have*." 80 U.S. at 145 (emphasis added). Thus, problematically, Congress had told the Court how to interpret not a statute but an act by the President pursuant to his exclusive constitutional power (the pardon), and further, to do so in a way that was contrary to how the Court had already decid-

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of presidential pardons as [an] unconstitutional infringement[] on executive powers") (opinion by then-Assistant Attorney General Scalia); *see also Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. 1, 29 (2009) (same); *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 266 n.38, 267 n.40 (1996) (same); *Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 196 n.16 (1996) (same); *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 188 n.7 (1996) (same).

ed to interpret it. *Id.* at 148 (stressing that the law "required [the Court] to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their *legal effect*" (emphasis added)). Put another way, Congress was attempting to usurp the courts' power and duty to "say what the law is." *Marbury*, 5 U.S. at 177.

The Court also criticized Congress's patent manipulation of the courts' jurisdiction. Petitioner maintains that the Court in *Klein* objected that the law at issue "dictate[d] the outcome of pending cases" by "prescrib[ing] rules of decision." Pet. Br. 19. But that overlooks a critical aspect of the relevant passage: the Court was objecting that "*the denial of jurisdiction*" by the challenged law was "founded solely on the application of a rule of decision" in pending cases. *Klein*, 80 U.S. at 146 (emphasis added). What the Court meant was that instead of simply eliminating the courts' jurisdiction to hear suits like Klein's—which Congress had authority to do—the law at issue preserved that jurisdiction but then directed the courts to dismiss for lack of jurisdiction if they would otherwise reach a judgment on the merits that was adverse to the United States or had accepted proof that would presumably lead to such a judgment. *Id.* ("The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.").

In the Court's view, the law's manipulation of jurisdiction amounted to a congressional effort to dictate the *judgment* the courts would render rather than the law they would apply to reach a judgment. *E.g.*, *Klein*, 80 U.S. at 145 ("[T]he language of the proviso shows plainly that it does not intend to withhold appellate ju-

risdiction except as a means to an end."); *id.* at 146 ("It seems to us that this is not the exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."). The Court found this an impermissible incursion upon the Judiciary: "Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." *Id.* at 147; *see also Sioux Nation*, 448 U.S. at 405 (noting "of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor").

In short, the law at issue in *Klein* did not simply prescribe a standard (dispositive or otherwise) for the court to apply in pending cases. It instructed the courts to adopt Congress's interpretation of the legal effect of a constitutional action by the President, which was contrary to the interpretation that the Court had already adopted; it manipulated jurisdiction to ensure that the courts entered a judgment favorable to the United States (dismissal) if they would otherwise have ruled for the claimant; and it did all of this to defeat the President's exercise of his exclusive constitutional pardon power. Section 8772, in contrast, shares none of these features and is therefore permitted by *Klein*.

D. Section 8772's Constitutionality Is Reinforced By The Political Branches' Power To Regulate Foreign Affairs

Finally, § 8772 is constitutional for an additional reason: it governs execution against a foreign state's property in satisfaction of a terrorism judgment against

the state. The political branches' authority to carry out the Nation's foreign affairs provides a strong basis for not reading *Klein* or other decisions so broadly as to fetter their ability to adjust the remedies available in a suit (such as this) against a foreign sovereign with substantial foreign affairs implications.

The Constitution "confide[s]" the regulation of foreign affairs to "the political departments of the government, Executive and Legislative." *Chicago & S. Air Lines*, 333 U.S. at 111; *see Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. __, 3-4 (Sept. 19, 2011). Yet occasionally "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

Various devices have been developed to ensure that courts respect the constitutional allocation of power over foreign affairs in such cases. One is the political question doctrine, which precludes the judiciary from deciding a claim if doing so would call upon the court to "supplant a foreign policy decision of the political branches with the courts' own unmoored determination." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1427 (2012). Another safeguard is Congress's "undisputed power to decide ... whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden*, 461 U.S. at 493. Issues of foreign sovereign immunity are "rather questions of policy than of law" and are "for diplomatic, rather than legal discussion." *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812). Accordingly, prior to enactment of the FSIA, courts adhered assiduously to

the political branches' determinations of when a foreign sovereign should be immune from suit: the Judiciary should neither "deny ... immunit[ies]" that Congress and the President have "seen fit to allow," nor "allow ... immunit[ies] on new grounds" that the political branches have "not seen fit to recognize." *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 35 (1945); *see also Possible Participation by the United States in* Islamic Republic of Iran v. Pahlavi, 4 Op. O.L.C. 160, 163 (1980) (recognizing "long history of deference by courts to executive foreign policy determinations" regarding foreign sovereign immunity).

The law at issue here embodies just such a policy decision. The Iran Threat Reduction and Syria Human Rights Act of 2012 establishes "a comprehensive policy"—"consistent with" the Executive's policy position—to achieve "the goal of compelling Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities." 22 U.S.C. § 8711. Section 8772 furthers that foreign affairs goal by making certain financial assets that the government of Iran holds in the United States available for attachment and execution. In other words, by enacting § 8772 and amending the FSIA, the political branches have "not seen fit to recognize" immunity from execution or attachment for the Iranian assets at issue here, and the courts should respect that decision.

That the political branches made this determination with respect to specific assets at issue in a pending lawsuit does not diminish the validity of their determination. To regulate foreign affairs effectively, the political branches must be able to act narrowly, flexibly, and promptly. Thus, many decisions regarding foreign affairs must be made on a case-by-case basis, even if that means altering the immunity rules for a specific pend-

ing lawsuit. Historically, that is precisely how foreign sovereign immunity determinations were made. *E.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 687 (2004) (noting the pre-FSIA policy of "deferring to case-by-case immunity determinations by the State Department"). Indeed, even since enacting the FSIA, Congress has made immunity determinations limited to a single pending case. *See, e.g.*, *OLC Iran Op.*, 25 Op. O.L.C. at 284 (concluding statutory provision removing Iran's foreign immunity in pending hostages litigation did not raise constitutional concerns under *Plaut* or *Klein*); *see also Congressional Authority to Modify an Executive Agreement Settling Claims Against Iran*, 4 Op. O.L.C. 289, 290 (1980) (concluding there would be "no legal impediment" if Congress decided to amend the FSIA to abrogate Iran's sovereign immunity in tort claims arising out of hostage crisis).

In short, whatever their application in ordinary cases, *Klein* and other decisions articulating principles for respecting the separation of powers between the Legislative and Judicial Branches should not be read to prohibit legislation defining the availability of immunity to a foreign sovereign or the availability of its assets to satisfy a judgment against it, even if limited to an identified pending case (or series of related cases). Because that is all that § 8772 does, it does not violate the constitutional separation of powers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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Charles J. Cooper served as Assistant Attorney General for the Office of Legal Counsel between 1985 and 1988.

Walter Dellinger served as Assistant Attorney General for the Office of Legal Counsel between 1993 and 1996 and as Acting Solicitor General of the United States between 1996 and 1997.

Howard C. Nielson, Jr., served as Deputy Assistant Attorney General for the Office of Legal Counsel between 2003 and 2005 and as Counsel to the Attorney General between 2001 and 2003.

Beth Nolan served as Deputy Assistant Attorney General for the Office of Legal Counsel from 1996 to 1999 and as Counsel to the President between 1999 and 2001.

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Christopher H. Schroeder served as Acting Assistant Attorney General and Deputy Assistant Attorney General for the Office of Legal Counsel between 1994 and 1997 and as Assistant Attorney General for the Office of Legal Policy between 2010 and 2012.